

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KERRY D. AUSTIN,

3:14-cv-00706-YY

Plaintiff,

ORDER

v.

UNION BOND & TRUST CO. and
MORLEY CAPITAL MANAGEMENT,

Defendants.

BROWN, Judge.

Magistrate Judge Janice M. Stewart¹ issued Findings and Recommendation (#127) on February 19, 2016, in which she recommends the Court grant in part and deny in part Defendants' Motion (#46) to Dismiss for Failure to State a Claim that was converted into a motion for summary judgment. In particular, Magistrate Judge Stewart recommends the Court grant Defendants'

¹ This matter was reassigned to Magistrate Judge Youlee Yim You on March 2, 2016, after Magistrate Judge Stewart referred the Findings and recommendation to this Court.

Motion as to Plaintiff's theory of liability premised on excessive fees, but deny Defendants' Motion as to Plaintiff's theory based on investment strategy.

Defendants filed timely Objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

Defendants contend the Magistrate Judge erred when she concluded genuine disputes of material fact exist as to Plaintiff's claim that Defendants' investment strategies give rise to a breach of Defendants' fiduciary duty to Plaintiff. In particular, Defendants assert the Magistrate Judge erred when she identified a dispute between the parties' experts regarding the reasonableness of the duration of the investments in the Principal Stable Value Fund because the experts' respective opinions do not, in fact, differ in that respect. Moreover, Defendants contend the Magistrate Judge erred when she considered the opinion of Plaintiff's expert, Steve Pomeratz, Ph.D., because Dr. Pomeratz's opinion was insufficiently supported by facts and relied too extensively on his professional experience.

This Court has carefully considered Defendants' Objections and concludes they do not provide a basis to modify the Findings and Recommendation. The Court concludes the Magistrate Judge appropriately considered Dr. Pomeratz's opinion as part of the record on summary judgment and properly identified a dispute

between the parties' experts that was inappropriate for resolution on summary judgment. Moreover, the Magistrate Judge also correctly identified additional genuine disputes of material fact (including references in the limited discovery materials to breaches in Defendants' own investment guidelines) that render summary judgment for Defendants inappropriate as to Plaintiff's investment-strategy theory. The Court also has reviewed the pertinent portions of the record *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

Moreover, the Court denies Defendants' Motion (#133) for Leave to Respond in which Defendant seeks leave to file a reply memorandum to Plaintiff's Opposition to Defendants' Objections to the Findings and Recommendation. Defendants have not demonstrated Plaintiff raised any unforeseeable argument in response to Defendants' Objections, and, in any event, the Court concludes further argument would not affect the outcome.

CONCLUSION

Accordingly, the Court **ADOPTS** Magistrate Judge Stewart's Findings and Recommendation (#127). The Court, therefore, **GRANTS in part** Defendants' (#46) to Dismiss as to Plaintiff's excessive-fees theory of liability and **DENIES in part** Defendants' Motion as to Plaintiff's investment-strategy theory. The Court also **DENIES** Defendants' Motion (#133) for Leave to Respond. This matter is

returned to Magistrate Judge Youlee Yim You for further proceedings.

IT IS SO ORDERED.

DATED this 30th day of March, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge